

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

KIRT D. ROBINSON,

Plaintiff,

v.

MR. NAGEL, et. al.,

Defendants.

3:13-cv-00422-MMD-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court is defendant Paulsen's Motion to Dismiss; or in the Alternative, Motion for Summary Judgment. (Doc. # 8.)<sup>1</sup> Plaintiff filed a response (Doc. # 12), and defendant Paulsen filed a reply. (Doc. # 13.)

After a thorough review, the court recommends that defendant Paulsen's motion be granted and that Plaintiff's action be dismissed without prejudice for failing to exhaust his administrative remedies before filing suit.

**I. BACKGROUND**

Plaintiff, a pro se litigant, brings this action pursuant to 42 U.S.C. § 1983 related to events that he alleges occurred while he was in the custody of the Washoe County Sheriff's Department (in the Washoe County Detention Facility) in August and September of 2012. (Pl.'s Compl., Doc. # 4 at 1.) He is currently incarcerated within the Nevada Department of Corrections. (*Id.*) The only defendant that has been served to date is Bobbi Paulsen.

Plaintiff's complaint named Unit 13 Officer Nagel, Supervisor Mr. Bobby (defendant

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<sup>1</sup> Refers to court's docket number.

1 Bobbi Paulsen), and head nurse Jane Doe. (Doc. # 4 at 2.) Plaintiff alleges that he was forced as  
2 a pretrial detainee to work in the jail laundry room even though he had informed jail officials that  
3 he is "100% disabled" due to psoriasis and arthritis. (Doc. # 4.) He contends that defendants  
4 threatened to place him in "the hole" or administrative or disciplinary segregation if he did not  
5 comply. (*Id.*) On screening, the court determined Plaintiff stated a colorable claim for  
6 involuntary servitude under the Thirteenth Amendment. (Screening Order, Doc. # 3 at 1.)

7 Summons were issued as to Nagel and Bobby Paulsen (Doc. # 5), and Paulsen was  
8 served on May 13, 2014 (Doc. # 6). The U.S. Marshal was unable to locate Nagel. (Doc. # 7.)  
9 Defendant Paulsen then filed the instant motion to dismiss. (Doc. # 8.) On September 8, 2014,  
10 the court issued a notice of intent to dismiss Nagel pursuant to Federal Rule of Civil Procedure  
11 4(m), for failing to serve him with the summons and complaint within 120 days. (Doc. # 14.)

12 Plaintiff filed a response stating that he believes Nagel works at the Sheriff's Department.  
13 (Doc. # 15.) The court then issued an order indicating that the unexecuted return of service  
14 indicated that Nagel was no longer employed by the Sheriff's Department, but asked defense  
15 counsel to either file a notice of acceptance of service or last known address under seal for  
16 Nagel. (Doc. # 16.) Defendants submitted a filing indicating that Nagel could be one of two  
17 persons with the name of Nagel working at the time the alleged events occurred. (Doc. # 18.)  
18 Plaintiff was directed to file a notice of clarification regarding which Nagel he desires to proceed  
19 against. (*Id.*) The court subsequently gave Plaintiff additional time to name the correct defendant  
20 Nagel. (Doc. # 20.) He was advised if he failed to do so, defendant Nagel would be dismissed  
21 without prejudice. (*Id.*) If he did name the correct defendant, Plaintiff would be given an  
22 opportunity to effectuate service. (*Id.*)<sup>2</sup>

23 Plaintiff has not substituted in a named defendant for Jane Doe Nurse. She was identified  
24 in various filings by Plaintiff and Defendants as Shannon Howell; therefore, the court gave  
25 Plaintiff fourteen days to file a motion to substitute her in place of the Jane Doe Nurse, and then  
26 would have to effectuate service. (Doc. # 18.) Plaintiff failed to file a motion for substitution

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27  
28 <sup>2</sup> If the correct Nagel is timely substituted in as a defendant, and service is ultimately accomplished, Nagel  
will then have the obligation of raising and proving the affirmative defense of failure to exhaust.

1 within the fourteen day time period; therefore, the court dismissed Howell without prejudice.  
2 (Doc. # 20.)

3 In the Motion to Dismiss; or in the Alternative, Motion for Summary Judgment,  
4 defendant Paulsen argues that Plaintiff failed to exhaust his administrative remedies before filing  
5 this lawsuit. (Doc. # 8.)

## 6 **II. LEGAL STANDARD**

7 The Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought  
8 with respect to prison conditions under section 1983 of this title, or any other Federal law, by a  
9 prisoner confined in any jail, prison, or other correctional facility until such administrative  
10 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). An inmate must exhaust his  
11 administrative remedies irrespective of the forms of relief sought and offered through  
12 administrative avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

13 The failure to exhaust administrative remedies is "an affirmative defense the defendant  
14 must plead and prove." *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014), *cert. denied*, 135  
15 S.Ct. 403 (Oct. 20, 2014) (quoting *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007)). Unless the  
16 failure to exhaust is clear from the face of the complaint, the defense must be raised in a motion  
17 for summary judgment. *See id.* (overruling, in part, *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th  
18 Cir. 2003), which stated that failure to exhaust should be raised in an "unenumerated Rule 12(b)  
19 motion"). As such, "[i]f undisputed evidence viewed in the light most favorable to the prisoner  
20 shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. If  
21 material facts are disputed, summary judgment should be denied, and the district judge rather  
22 than a jury should determine the facts [in a preliminary proceeding]." *Id.*, 1168, 1170-71  
23 (citations omitted). "Exhaustion should be decided, if feasible, before reaching the merits of a  
24 prisoner's claim. If discovery is appropriate, the district court may in its discretion limit  
25 discovery to evidence concerning exhaustion, leaving until later—if it becomes necessary—  
26 discovery related to the merits of the suit." *Id.* at 1170 (citing *Pavey v. Conley*, 544 F.3d 739, 742  
27 (7th Cir. 2008)). If there are disputed factual questions, they "should be decided at the very  
28 beginning of the litigation." *Id.* at 1171.

1 "The PLRA mandates that inmates exhaust all available administrative remedies before  
 2 filing 'any suit challenging prison conditions,' including, but not limited to, suits under § 1983."  
 3 *Id.* (citing *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). To be clear, "[a]n inmate is required to  
 4 exhaust only *available* remedies." *Id.* (emphasis original) (citing *Booth v. Churner*, 532 U.S.  
 5 731, 736 (2001)). "To be available, a remedy must be available 'as a practical matter'; it must be  
 6 'capable of use; at hand.'" *Id.* (quoting *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005)).

7 Once a defendant shows that the plaintiff did not exhaust available administrative  
 8 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is  
 9 something in his particular case that made the existing and generally available administrative  
 10 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d  
 11 767, 778 n. 5 (9th Cir. 1996)). The ultimate burden of proof, however, remains with the  
 12 defendant. *Id.*

13 The Supreme Court has clarified that exhaustion cannot be satisfied by filing an untimely  
 14 or otherwise procedurally infirm grievance, but rather, the PLRA requires "proper exhaustion."  
 15 *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). "Proper exhaustion" refers to "using all steps the  
 16 agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)."  
 17 *Id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).

18 If the court concludes that administrative remedies have not been properly exhausted, the  
 19 unexhausted claim(s) should be dismissed without prejudice. *Wyatt v. Terhune*, 315 F.3d 1108,  
 20 1120 (9th Cir. 2003), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162.

### 21 **III. DISCUSSION**

#### 22 **A. Defendant Paulsen's Motion (Doc. # 8)**

23 First, defendant Paulsen argues that on the face of his Complaint, Plaintiff admits he did  
 24 not utilize the jail's grievance process before he filed this action. (Doc. # 8 at 6.) In his form  
 25 complaint, which asks whether he attempted to resolve the dispute by exhausting available  
 26 administrative grievance procedures, Plaintiff responded that he had not. (*Id.*, citing Doc. # 4 at  
 27 8.) Therefore, Paulsen maintains that this action should be dismissed.

28 Second, defendant Paulsen contends that if the failure to exhaust his administrative

1 remedies is not clear from the face of the complaint, Paulsen is still entitled to summary  
2 judgment because Plaintiff's inmate records from the jail likewise indicate he failed to exhaust  
3 his administrative remedies with respect to the allegations of this action. (*Id.* at 7-8.)

4 **B. Plaintiff's Response (Doc. # 12)**

5 In his response, Plaintiff asserts that he did exhaust his administrative remedies. (Doc.  
6 # 12 at 1-2.) He states that once the jail staff believed he was in fact disabled, his involuntary  
7 servitude ceased. (*Id.* at 2.) He contends that the cessation of the involuntary servitude served to  
8 exhaust his administrative remedies, as there was no longer a need to utilize the grievance  
9 procedure. (*Id.*)

10 **C. Defendant Paulsen's Reply (Doc. # 13)**

11 Defendant Paulsen argues that the fact that Plaintiff claims the alleged constitutional  
12 violation eventually ceased does not excuse him from utilizing the jail's grievance process. (Doc.  
13 # 13 at 3.) Instead, defendant Paulsen contends that Plaintiff alleges he was subjected to  
14 involuntary servitude for five weeks, but never submitted a single grievance or inmate request  
15 form complaining about his treatment so as to allow administrators to investigate the matter. (*Id.*  
16 at 3-4.) Therefore, this action should be dismissed.

17 **D. Analysis**

18 Defendants are correct that in his Complaint, Plaintiff states that he did not exhaust his  
19 administrative remedies. (Doc. # 4 at 8.) He states: "There was no grievance because I was not in  
20 prison when my rights were violated. I was in Washoe County Detention Facility" (*Id.* at 8-9.)

21 Insofar as Plaintiff's Complaint appears to assert that he did not have to exhaust his  
22 administrative remedies because he was not in prison, but in jail, he is mistaken. The PLRA on  
23 its face requires exhaustion by an inmate confined in "any *jail*, prison, or other correctional  
24 facility." 42 U.S.C. § 1997e(a) (emphasis added). Moreover, the Ninth Circuit has confirmed that  
25 the exhaustion requirement applies to pretrial detainees. *See Albino v. Baca*, 747 F.3d 1162 (9th  
26 Cir. 2014) (applying PLRA to action brought by pretrial detainee); *Page v. Torrey*, 201 F.3d  
27 1136, 1140 (9th Cir. 2000).

28 While Plaintiff's failure to exhaust administrative remedies appears on the face of his

1 Complaint (despite his assertion of an invalid excuse), the court will now analyze the defense as  
2 presented in defendant Paulsen's motion for summary judgment, by taking into account the jail's  
3 grievance procedures and whether Plaintiff followed them or otherwise asserts a valid claim that  
4 the grievance process was unavailable to him.

5 The Washoe County Sheriff's Standard Operating Procedures (SOPs) govern the  
6 grievance process in the Washoe County Detention Facility. (Doc. # 8-1 at 2-6; Doc. # 8-1 at 21  
7 ¶ 5.) SOP 720.033 provides: "All inmates will be afforded the right to grieve any and all  
8 conditions through a minimum of one level of appeal." (Doc. # 8-1 at 4.) "If the inmate is  
9 involved in an incident, or has a specific situation they feel is unfair, they may institute the  
10 inmate grievance procedure. They will be required to follow each step of the grievance  
11 procedure before escalating to the next step." (*Id.*) The first step is to "[a]ttempt to resolve the  
12 matter with the housing unit deputy." (*Id.*) An oral complaint or informal grievance must be  
13 presented no later than five days from the date of the event." (*Id.*) If the concerns are not  
14 resolved, the inmate must complete an "Inmate Request Form" and place it in the "PREA/Inmate  
15 Grievance" box, and the inmate should receive a written response within seven days. (*Id.*) If the  
16 situation is still not resolved, the inmate is to submit another Inmate Request Form detailing  
17 previous attempts to resolve the situation. (*Id.*) If there is no resolution, the inmate may initiate  
18 an appeal. (*Id.*)

19 Plaintiff submitted various inmate request forms during his stay at the Washoe County  
20 Detention Facility, including requests for religious publications, issues with telephone calls, a  
21 request for glasses, requests for information regarding out-patient, treatment and transitional  
22 programs, applications for self-parole, and a request for information to give to his attorney. (Doc.  
23 # 8-1 at 7-19; Doc. # 8-1 at 21 ¶¶ 4, 6.) Absent from the forms he submitted is a complaint about  
24 being subject to involuntary servitude at the facility. Therefore, he failed to exhaust his  
25 administrative remedies pursuant to SOP 720.033 prior to initiating this action.

26 Plaintiff contends that he was excused from the exhaustion process because the allegedly  
27 unconstitutional conduct eventually ceased.

28 An inmate need only exhaust "available" administrative remedies. *See Albino*, 747 F.3d

1 at 1171 (citing *Woodford v. Ngo*, 548 U.S. 81, 85 (2006); *Booth v. Churner*, 532 U.S. 731, 736  
2 (2001)). "To be available, a remedy must be available 'as a practical matter'; it must be 'capable  
3 of use; at hand.'" *Id.* (quoting *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005)).

4 Once a defendant shows that the plaintiff did not exhaust available administrative  
5 remedies, the burden shifts to the plaintiff "to come forward with evidence showing that there is  
6 something in his particular case that made the existing and generally available administrative  
7 remedies effectively unavailable to him." *Id.* at 1172 (citing *Hilao v. Estate of Marcos*, 103 F.3d  
8 767, 778 n. 5 (9th Cir. 1996)).

9 The Ninth Circuit has recognized several instances where administrative remedies are  
10 unavailable. "[W]here a prison warden incorrectly implied that an inmate needed access to a  
11 nearly unobtainable prison policy in order to bring a timely administrative appeal, 'the Warden's  
12 mistake rendered [the plaintiff's] administrative remedies effectively unavailable.'" *Albino*, 747  
13 F.3d at 1172-73 (quoting *Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010)).

14 "[W]here prison officials declined to reach the merits of a particular grievance 'for  
15 reasons inconsistent with or unsupported by applicable regulations,' administrative remedies  
16 were 'effectively unavailable.'" *Id.* at 1173 (quoting *Sapp v. Kimbrell*, 623 F.3d 813, 823-24 (9th  
17 Cir. 2010)).

18 Where an inmate "did not have access to the necessary grievance forms within the  
19 prison's time limits for filing a grievance," the administrative remedies were effectively  
20 unavailable. *Id.* (citing *Marella v. Terhune*, 568 F.3d 1024, 1027-28 (9th Cir. 2009)). Nor is an  
21 inmate required to exhaust a remedy that he had been reliably informed was not available to him.  
22 *Id.*

23 In *Albino v. Baca*, the Ninth Circuit held that where the jail manual detailing the  
24 grievance process was for staff use only and was not made available to inmates, and inmate  
25 request forms were never provided to the inmate despite repeated complaints, the jail did not  
26 provide an available administrative remedy. *Albino*, 747 F.3d at 1177.

27 Plaintiff's argument that the voluntary cessation of the alleged unconstitutional conduct  
28 excuses him from exhausting administrative remedies does not fall within any of the exceptions

1 to the exhaustion requirement recognized by the Ninth Circuit.

2 While the Ninth Circuit has held that an inmate is not required to complete the  
3 administrative review process where a grievance is granted or partially granted to the inmate's  
4 satisfaction, this presupposes that the inmate initiated a grievance allowing the administrators to  
5 investigate and try to resolve the complaint. *See Harvey v. Jordan*, 605 F.3d 681, 685 (9th Cir.  
6 2010); *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

7 Plaintiff's argument might be construed as asserting that the voluntary cessation of the  
8 allegedly unconstitutional conduct is the functional equivalent of the granting of relief sought in  
9 a grievance. However, a prisoner is required to "exhaust administrative remedies even where the  
10 relief sought—monetary damages— cannot be granted by the administrative process." *Woodford*  
11 *v. Ngo*, 548 U.S. 81, 85 (2006) (citing *Booth v. Churner*, 532 U.S. 731, 734 (2001)). What  
12 Plaintiff suggests here is contrary to the intention of the PLRA. As the Supreme Court stated,  
13 "[e]xhaustion gives an agency 'an opportunity to correct its own mistakes with respect to the  
14 programs it administers before it is haled into federal court,' and it discourages 'disregard of [the  
15 agency's] procedures.'" *Id.* at 89 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).  
16 Exhaustion also "promotes efficiency." *Id.* "And even where a controversy survives  
17 administrative review, exhaustion of the administrative procedure may produce a useful record  
18 for subsequent judicial consideration." *Id.* (quoting *McCarthy*, 503 U.S. at 145).

19 If the court accepted Plaintiff's argument, the jail would be denied of the opportunity to  
20 correct mistakes before a federal lawsuit is initiated, and the court and parties would be denied  
21 the utility of a record generated through the administrative review process.

22 As such, the court concludes that the voluntary cessation of the allegedly unconstitutional  
23 conduct does not excuse Plaintiff from the exhaustion requirement. Therefore, Plaintiff has failed  
24 to exhaust his administrative remedies prior to filing this action, and it should be dismissed  
25 without prejudice as to defendant Paulsen.

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**IV. RECOMMENDATION**

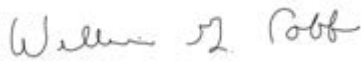
**IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING** Defendant Paulsen's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Doc. # 8) and **DISMISSING** Plaintiff's claims **WITHOUT PREJUDICE** as to defendant Paulsen as a result of Plaintiff's failure to exhaust his administrative remedies before filing suit.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

DATED: December 30, 2014

  
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WILLIAM G. COBB  
UNITED STATES MAGISTRATE JUDGE